No. 300

In the Supreme Court of the United States

OCTOBER TERM, 1939

JERRY BRUNO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:

188707—39——1

Cases—Continued.

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OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 417–421) is reported in 105 F. (2d) 921.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 20, 1939 (R. 422). The petition for a writ of certiorari was filed in this Court on August 18, 1939, and was granted on October 9, 1939 (R. 424). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the refusal of the trial court to charge that no presumption should be raised against petitioner, because of his failure to testify, constituted reversible error.

2. Whether the proof established not a single conspiracy, as charged in the indictment, but several separate conspiracies and, if so, whether the variance is fatal.

3. Whether an intercepted intrastate telephone conversation was properly admitted in evidence, and if not, whether its admission constituted prejudicial error.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides, in part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The Act of March 16, 1878, c. 37, 20 Stat. 30 (U. S. C., Title 28, Section 632), provides:

> In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his

failure to make such request shall not create any presumption against him.

Section 605 of the Communications Act of 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605) provides, so far as pertinent:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

STATEMENT

On December 6, 1937, an indictment was returned in the United States District Court for the Southern District of New York, charging the petitioner and eighty-seven others with a conspiracy to import, sell, transport, and conceal narcotic drugs, contrary to law (R. 3, 7–16). The indictment alleged that it was a part of such conspiracy that the defendants would unlawfully import and cause to be imported large quantities of narcotic drugs into the Southern District of New York on various transatlantic steamships; that the defendants would arrange for the transportation of such narcotic drugs from the steamship piers or other places within the harbor of the Port of New York, after the drugs had been removed from the steamships, to points within the Borough of Manhattan; that, pursuant to a prearranged plan and scheme, certain of the defendants would receive the drugs

and communicate the fact of their arrival and receipt to other members of the conspiracy; and that certain of the defendants would conceal such narcotic drugs at places in the Southern District of New York pending their ultimate disposition, and that, in furtherance of the conspiracy, plans would be made and adopted for the sale, transportation, and distribution of such narcotic drugs to other defendants, some of whom were in the Southern District of New York, some in Brooklyn, and others in Louisiana and Texas (R. 12–13).

Of the eighty-eight defendants, twenty pleaded guilty before trial, the case was severed as to some of the defendants, and twenty stood trial. During the course of the trial one defendant pleaded guilty. Upon motion of the Government the indictment was dismissed as to two defendants and the trial court directed a verdict of acquittal as to two others. The jury returned a verdict of not guilty as to three defendants and convicted the other twelve, including the petitioner (Government's brief in the Circuit Court of Appeals, pp. 1–2, R. 5, 324–325, 345). Petitioner was sentenced to two years imprisonment and fined $5,000 (R. 5). The petitioner and another appealed to the Circuit Court of Appeals for the Second Circuit where the judgment against the petitioner was unanimously affirmed (R. 421, 422).

The evidence relating to the nature and scope of the conspiracy and the participation of the peti-

tioner therein is summarized in the Appendix, *infra* pp. 39–47.

SUMMARY OF ARGUMENT

1. The trial court did not commit reversible error in failing to instruct the jury, in accordance with the petitioner's requested instruction No. 37, that his failure to testify created no presumption against him. U. S. C. Title 26, Sec. 632, upon which the petitioner relies, properly construed, prohibits only comment by court or counsel upon the silence of the accused which would create or tend to create a presumption against him. There was no such comment in the instant case, and in the absence of such comment the statute does not require the giving of an instruction such as that requested. Such an instruction could not overcome the natural inference which the jury might draw from the failure of an accused to take the stand.

Since the Fifth Amendment protects an accused only against compulsory self-incrimination and since it is a matter of choice whether an accused shall remain silent, his exercise of that choice cannot be said to involve such compulsory self-incrimination as to require, in the absence of comment, the giving of an instruction such as that sought by the petitioner.

2. As charged in the indictment, the evidence established a single conspiracy among the defendants to smuggle, transport, conceal and sell narcotic

drugs pursuant to a common plan whereby there was established a complete system for the flow of narcotics from steamship to addict. The fact that the conspirators may be divisible into groups because of the part each played in effectuating the common enterprise, does not render the conspiracy multiple. Nor is it material that some of the groups did not have immediate contact or communication with other groups. The repeated transactions, the volume of narcotics involved, and the circumstances under which the transactions were consummated, lead to no other conclusion than that each group, in playing its allotted part, was chargeable with knowledge of the common unlawful design.

However, even if the proof established more than one conspiracy, there is no support for the view that petitioner's substantial rights were in any wise adversely affected by the variance.

3. The admission of the intercepted intrastate telephone communication, of which petitioner complains, was not prohibited by Section 605 of the Communications Act of 1934. However, even if the communication was inadmissible under that section, its admission did not constitute prejudicial error because the communication was at most merely corroborative of direct testimony of a Government witness to the same effect.

ARGUMENT

I

THE REFUSAL OF PETITIONER'S REQUESTED INSTRUCTION THAT HIS FAILURE TO TESTIFY CREATED NO PRESUMPTION AGAINST HIM WAS NOT REVERSIBLE ERROR

In the instant case a large number of defendants were on trial. Some of them elected to testify, while others, including the petitioner, did not. At the conclusion of the trial court's charge to the jury the following occurred (R. 345):

> The COURT: There have been certain requests submitted to me, and as to any of those requests which I have not incorporated in my charge, the respective counsel may consider that those requests are rejected and an exception entered as to each one.
>
> Are there any exceptions to the charge as delivered?
>
> Mr. EDELSTEIN: On behalf of my two clients there is no exception to the charge as delivered. But I want to direct your Honor to certain charges which I think, if I direct your attention to them, your Honor will charge.
>
> The COURT: What numbers are they, Mr. Edelstein?
>
> Mr. EDELSTEIN: One is No. 37.
>
> The COURT: I feel that I have already covered that.
>
> Mr. EDELSTEIN: I respectfully except.

Requested instruction No. 37, which was not contained in the court's charge, was as follows (R. 398):

> The failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.[1]

The petitioner contends that by virtue of the Act of March 16, 1878, c. 37, 20 Stat. 30 (U. S. C., Title 28, Sec. 632), *supra*, pp. 2–3, the trial court committed reversible error in failing to give the requested instruction. This statute, after stating that a defendant in a criminal case shall, at his own request, be a competent witness, provides that his failure to be a witness "shall not create any presumption against him".

This Act was under consideration by this Court in *Wilson* v. *United States*, 149 U. S. 60. In that case the defendant did not take the stand and the prosecutor, in his summation, commented on that

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[1] This requested instruction, although not printed in the bill of exceptions, was set forth in ground of appeal No. 10 (R. 398) contained in the petitioner's Notice of Appeal and also in assignment of error No. 10 (R. 407) of the petitioner's Assignment of Errors in the court below. It was stipulated between counsel for the parties (R. 424) that the requested instruction No. 37 is identical in language with the instruction set forth in the Notice of Appeal and Assignment of Errors.

fact and strongly intimated that it was a circumstance against the innocence of the defendant. In holding that the prosecutor's comments violated the statute, this Court, after summarizing the statute, said (p. 65):

> To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.[2]

And with reference to the insufficiency of the trial court's condemnation of the prosecutor's comments, this Court said (p. 67):

> It should have said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify.

There was thus established the rule that the statute prohibits any comment by either court or counsel upon the accused's failure to testify which would create a presumption against him, and that

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[2] In *Reagan* v. *United States*, 157 U. S. 301, 304–305, this Court said: "Under that statute it is a matter of choice whether he [the accused] become a witness or not, and his failure to accept the privilege 'shall not create any presumption against him.' This forbids all comment in the presence of the jury upon his omission to testify." See also *McKnight* v. *United States*, 115 Fed. 972, 981–983 (C. C. A. 6th).

where such comment is made the trial court is required to instruct the jury that it is forbidden by the statute.

The petitioner, however, asserts that the trial court in its charge had brought to the jury's attention the petitioner's failure to testify and that, therefore, the failure to give the requested instruction was error. He bases this assertion upon the following language in the charge (R. 332):

> It is the privilege of a defendant to testify as a witness if, and only when, he so elects; and when he does testify his credibility is to be determined in the light of his interest, which usually is greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony.[1]

It seems clear, however, that under the rule in the *Wilson* case the foregoing language cannot be said to have constituted such a comment by the trial court upon the petitioner's failure to testify as to require the giving of petitioner's requested instruction. The above instruction was clearly directed to those defendants who did take the stand and was the usual counterpart of the language immediately following it (R. 332) which cautioned the jury to weigh the testimony of accomplices with care. The very fact that neither the petitioner nor any of the

[1] The above charge follows closely the instruction suggested by this Court in *Reagan* v. *United States*, *supra*, at pp. 310–311.

other defendants who failed to take the stand excepted to that portion of the charge, and thus gave acquiescence to it, justifies the view that it was regarded as directed to those defendants who testified, with no thought on the part of the court, counsel, or the jury, that it focused attention upon the petitioner or other defendants who did not testify.[4]

The instant case, therefore, presents the question whether it is reversible error for the trial court, in the absence of any prior comment by court or counsel as to a defendant's failure to testify, to refuse, upon request, to charge the jury that such failure does not create any presumption against the defendant.

The court below was of the opinion that the petitioner was not prejudiced by the refusal of the requested instruction. It said (R. 420):

> The statute is primarily intended to prevent the affirmative use of the accused's failure as an inference of guilt; and it would not be an error to refuse to charge the jury that they must not make that inference—at least it would not be except under some unusual circumstances that we cannot foresee. The important thing to bear in mind is the probable futility of the instruction. When an accused does not take the stand, every-

[4] In *Wilson* v. *United States*, *supra*; *McKnight* v. *United States*, *supra*, and *Hersh* v. *United States*, 68 F. (2d), 799 (C. C. A. 9th), cited by the petitioner, it is clear there was adverse comment by either court or counsel upon the failure of the accused to testify.

> body knows that he fears to do so, for a man will not forego anything that may exculpate him. Sometimes no doubt he may merely be afraid that he cannot get out the truth on the stand, but that is very seldom. Ordinarily it is because he fears the disclosure which will result. Everybody knows this, and nobody can fail to make the inference, if he thinks about it at all; the accused's only safety is in having his failure kept as much as possible in the background. Hence the real protection, and the only practical protection, is in preventing the prosecution from using it as the basis of an inference of guilt. That is indeed a very real protection, for the prosecution's freedom would be a very deadly weapon; but the advantage derivable from an admonition by the judge that the jury shall make no such inference is wholly illusory; and only serves to put before them what will generally harm the accused, if it does anything at all.

The same court, in the earlier case of *Swenzel* v. *United States*, 22 F. (2d) 280 (C. C. A. 2d), had expressed a like view under circumstances substantially identical with those in the instant case.[5]

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[5] In holding that the refusal of the requested instruction did not require reversal, the court said (p. 282): "Undoubtedly to say anything about the failure of a defendant to testify tends to keep that prejudicial consideration before the jury. If it is better, as this court has said, not to mention it unless requested, how can it be error not to deal with it, even if requested? It would seem strange that the request of a defendant, or his counsel, could make a charge

A careful search among the Federal decisions upon the subject has failed to disclose a single case in which, in the absence of any comment on the failure of the defendant to testify, a conviction was reversed for refusal of the trial court, upon request, to give an instruction similar to that requested in the instant case.

In *Stout* v. *United States,* 227 Fed. 799, 803 (C. C. A. 8th), the court assumed *obiter* and without citing any authority that a defendant, upon request, was entitled to an affirmative instruction on the subject even in the absence of wrongful comment. It held, however, that since nothing occurred during the trial that required correction by the trial court on its own motion, and since the requested instruction did not sufficiently direct the court's attention to the subject matter on which a charge was desired, a refusal to give the instruction was not reversible error.

In *Michael* v. *United States,* 7 F. (2d) 865 (C. C. A. 7th), while the court, by way of *dictum,* assumed that a defendant was entitled to a requested instruction similar to that sought in the case at bar, it does not appear from the opinion whether there had been adverse comment upon the silence of the accused. It should be pointed

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compulsory which a court holds it better practice in general not to give. * * * In other words, if Bindel chose to exercise his constitutional right and not to testify, it seems exceedingly doubtful whether his situation would not have been prejudiced in fact by acceding to the charge requested."

out, however, that the court plainly indicated its doubt respecting the efficacy and advisability of such an instruction by saying (pp. 866–867):

> * * * There seems to be a difference of opinion among the judges and the bar as to whether such reference to the accused's failure to testify helps or injures him before the jury. Some courts have gone so far as to criticize the trial judge for giving such an instruction in the absence of a request. * * * It is, we believe, impossible to remove entirely the effect of the failure of the accused to deny under oath charges preferred against him when opportunity for so doing arises.

Strong support for the view that, in the absence of adverse comment during the trial, a defendant failing to take the stand is not prejudiced by the refusal of an instruction such as was requested herein, can be found in the fact that in a number of cases defendants have contended, without success, that it was reversible error, in the absence of a request, to give such an instruction.*

It would be a strange result indeed if an instruction which many defendants have urged it was

* *Hanish* v. *United States*, 22[illegible] Fed. 584 (C. C. A. 7th), certiorari denied, 239 U. S. 645; *Kreuzer* v. *United States*, 254 Fed. 34 (C. C. A. 8th), certiorari denied, 249 U. S. 603; *Robilio* v. *United States*, 259 Fed. 101 (C. C. A. 6th); *Becher* v. *United States*, 5 F. (2d) 45 (C. C. A. 2d), certiorari denied, 267 U. S. 602; *Kahn* v. *United States*, 20 F. (2d) 782 (C. C. A. 6th).

prejudicial to give when not requested, could acquire, by mere request, such a vital character that the refusal to give it constitutes reversible error. Furthermore, if, as the courts have said, the better rule requires the court, in the absence of a request by defendant, to say nothing on the point,[7] then it is difficult to see how a mere request to give the instruction can convert the court's silence into error. The rule that a defendant's rights are best protected by silence remains, and this is not changed by a request to instruct.

When this Court said, in the *Wilson* case, *supra* (p. 65), that "The minds of the jurors can only remain unaffected from this circumstance [accused's failure to testify] *by excluding all reference to it*", (italics ours), and in the *Reagan* case, *supra* (p. 305), that the statute "forbids all comment in the presence of the jury upon his [the defendant's] omission to testify," the Court was but expressing the logical view that the accused who does not testify is best protected, absent adverse comment, by absolute silence on the subject,[8] an objective, we submit, which is more effectively accomplished by excluding reference to the matter

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[7] *Becher* v. *United States*, *supra*; *Kahn* v. *United States*, *supra*.

[8] The *desideratum* of silence was not in any wise impaired in the instant case through the ruling of the trial court on the request to instruct since the substance of the requested instruction was not read orally in the presence of the jury (see p. 7 *supra*).

even in the court's charge. Thus in several states the statutes, in the absence of comment, have been construed as forbidding, with or without request, reference by the trial judge in his charge to the silence of the accused.[9]

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[9] *Tines* v. *Commonwealth*, 25 Ky. Law Rep. 1233; *Hanks* v. *Commonwealth*, 248 Ky. 203; *State* v. *Pearce*, 56 Minn. 226; *State* v. *Long*, 324 Mo. 205; *Mason* v. *State*, 53 Okla. Cr. R. 76; *Thompson* v. *State*, 88 Tex. Cr. 29; *Kinney* v. *State*, 36 Wyo. 466. Cf. *State* v. *Ford*, 109 Conn. 490; *Tucker* v. *State*, 29 Ga. App. 221.

In approximately 42 States there exist statutes, which in varying phraseology, prohibit any inference to be drawn from an accused's failure to testify (See *Wigmore on Evidence* (2d Ed.), Sec. 488, Note 2). These statutes fall into three general categories: They provide either (1) that the failure of the defendant to testify shall not create any presumption against him, (2) that such failure shall not be the subject of comment by counsel or by either court or counsel, or (3) contain both such provisions. (See 31 Mich. L. Rev. 40-43; Wigmore on Evidence, 1934 Supp., Sec. 2272, Note 2.) In Indiana (Burns Ann. Stat. 1926, Sec. 2267), Nevada (Rev. Laws 1912, Sec. 7161), and Washington (Comp. St. 1922, Sec. 2148), the statutes specifically require the trial judge, upon request, to instruct the jury in accordance with the statute.

In England, the Criminal Evidence Act of 1898, Sec. 1 (St. 61 & 62, Vict. c. 36), provides that the accused's failure to give evidence "shall not be made the subject of any comment by the prosecution." It was immediately decided that the statute did not prevent the judge from commenting on the accused's failure to testify. *R.* v. *Rhodes*, 1 Q. B. 77, 83 (1899); Cf. *The King* v. *Parker*, 1 K. B. 850 (1933).

As a necessary result of the difference in the language of the various state statutes, there has arisen a difference of view in respect of the necessity or propriety of referring, by instruction, to the defendant's silence in the

While there may be some difference of opinion as to whether an instruction such as was sought in the present case, aids or injures the accused before the jury, there is almost universal agreement in the view that it is inevitable that the jury will, despite the instruction, draw an adverse inference from the accused's failure to testify.[10] In *Raffel* v. *United States*, 271 U. S. 494, 499, this Court said:

> We need not close our eyes to the fact that every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence.

And in respect of the probable futility of an instruction, Professor Wigmore has said:[11]

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absence of comment. Thus, in apparent contrast with the decisions cited in the beginning of this note, several state courts have held that it is proper for the court to instruct the jury upon request, and that the refusal to do so is error (*Cox* v. *State*, 173 Ark. 1115; *People* v. *Greben*, 352 Ill. 582; *State* v. *Landry*, 85 Me. 95; *People* v. *Provost*, 144 Mich. 17; *Funches* v. *State*, 125 Miss. 140; *State* v. *Walker*, 94 W. Va. 691). On the other hand, as indicative of the view that the giving of an instruction on the subject of the accused's silence is not of vital necessity, are the unanimous decisions of the state courts that the failure to instruct, without request, is not error (*Bradley* v. *State*, 35 Ariz. 420; *People* v. *Mitsunaga*, 91 Cal. App. 298; *State* v. *Williams*, 90 Conn. 126; *State* v. *Reid*, 200 Iowa 892; *State* v. *Younger*, 70 Kan. 220; *State* v. *Lesh*, 27 N. D. 165; *Bosley* v. *State*, 69 Tex. Cr. 100; *State* v. *Comer*, 176 Wash. 257).

[10] See 31 Mich. L. R. 226, 229; *Michael* v. *United States*, *supra*; Opinion below (R. 420).

[11] Wigmore on Evidence (2d Ed.), Sec. 2272, p. 901.

> Nor is it proper to go so far as to *instruct the jury* (even when no comment has been made) to disregard the inference; it is well enough to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and a disrespect for the law's reasonableness.

Since, in the very instruction not to draw inferences from the silence of the accused, the fact is brought to the minds of the jury that the accused may, if he will, testify in his own behalf, thus only adding to the inevitable inference by the jury, it is difficult to see how the refusal to instruct the jury in any way adversely affects the substantial rights of the accused who is silent.

As illustrated by numerous decisions,[12] the statute is primarily intended to prevent the use of accused's failure to testify as an inference of guilt by prohibiting both court and prosecutor from commenting, in the presence of the jury, on that fact. The accused is only protected from having the fact of his silence being used, to his prejudice, as evidence of his guilt, in violation of his right to be silent until his guilt is established beyond a reasonable doubt. There is nothing in the statute

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[12] *Wilson* v. *United States*, *supra*; *Reagan* v. *United States*, *supra*; *McKnight* v. *United States*, *supra*; *Morrison* v. *United States*, 6 F. (2d) 809, 811 (C. C. A. 8th); *Nobile* v. *United States*, 284 Fed. 253, 256 (C. C. A. 3rd).

which protects him from an unfavorable inference which the jury might naturally draw from the exercise of his privilege to remain silent.

Frequently defendants who elected not to testify have urged that comment by the court or the prosecutor to the effect that certain testimony on the part of the Government was uncontradicted or that the defendant had failed to produce testimony to disprove material facts, constituted a comment upon the failure of accused to testify in violation of the statute. This contention has been uniformly rejected.[13] In the light of these decisions, it would seem to be an unwarranted extension of the statutory protection to hold that the statute is violated because the trial court refuses to call the jury's attention to the defendant's silence by an instruction that such silence shall create no presumption against him.

In the final analysis, the statute was designed to prevent the accused, by reason of his failure to testify, from being deprived of the presumption of innocence to which by law he is entitled.[14] And such presumption, we submit, could only be impaired by a comment by court or counsel "which would create or tend to create a presumption

[13] *Rinella* v. *United States*, 60 F. (2d) 216 (C. C. A. 7th); *Jenkins* v. *United States*, 58 F. (2d) 556 (C. C. A. 4th), certiorari denied 287 U. S. 622; *Slakoff* v. *United States*, 8 F. (2d) 9 (C. C. A. 3d); *Morrison* v. *United States*, 6 F. (2d) 809, 811 (C. C. A. 8th), and cases there cited.

[14] *Reagan* v. *United States*, *supra*, at p. 66.

against the defendant from his failure to testify." [15] In the instant case the trial court instructed the jury that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt and that the burden of proving such guilt rests upon the Government and must be sustained throughout the trial (R. 330).[16] Under this instruction the presumption of innocence could not be affected by the petitioner's exercise of his right not to testify.

Nor is there any merit in the petitioner's assertion that the constitutional privilege of an accused not to be compelled to be a witness against himself (Fifth Amendment) requires the giving of the instruction requested in the instant case. A constitutional provision which was adopted almost ninety years before the enactment of a statute which made an accused a competent witness in his own behalf but prohibited the creation of any presumption by reason of his silence, cannot reasonably be given a

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[15] *Wilson* v. *United States*, *supra*, at p. 67.

[16] The trial court instructed the jury as follows (R. 330): "Every defendant in a criminal case in this country is presumed at the outset to be innocent, and this presumption exists in his favor and abides with him for his proper protection until his guilt is established by the requisite measure of proof. This is true not only as respects the accusation as a whole, but also as respects every material element of it.

"The burden of proving guilt rests upon the Government and must be sustained by evidence which establishes guilt beyond a reasonable doubt. This burden rests upon the Government throughout the trial."

construction broader than the statute. Indeed, the very fact that Congress, as well as the legislatures of at least forty-two states (see footnote 9, *supra*, p. 16), deemed it necessary to prohibit by statute the creation of any inference of guilt from, or hostile comment upon, the accused's failure to testify, negatives any such contention. While the constitutional safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf,[17] it does not follow that permitting the jury to draw a natural inference from the accused's silence violates his privilege against self-incrimination.[18] We are aware of no decision of this or any other Federal court which enunciates such a doctrine, and the petitioner has cited none.

Mere self-incrimination is not prohibited by the Fifth Amendment. It is only when that incrimination becomes compulsory that the proscription of the Constitution becomes applicable.[19] Since, under the statute, "it is a matter of choice whether he [the accused] become a witness or not",[20] his failure to exercise such choice cannot be said to involve

[17] *Raffel* v. *United States*, *supra*, at p. 494.

[18] See *State* v. *Colonese*, 108 Conn. 454, 464; *State* v. *Bartlett*, 55 Me. 200; *Commonwealth* v. *People's Express Co.*, 201 Mass. 564.

[19] Cf. *Vajtauer* v. *Comm'r of Immigration*, 273 U. S. 103, 113; *Thompson* v. *United States*, 10 F. (2d) 781, 784 C. C. A. 7th); *Krotkiewicz* v. *United States*, 19 F. (2d) 421, 424–425 (C. C. A. 6th).

[20] *Reagan* v. *United States*, *supra*, at p. 305.

such compulsory self-incrimination as to require an instruction that no inference shall result because of the accused's election not to testify. Such a construction of the constitutional privilege against self-incrimination would permit the accused to use his silence as a sword rather than as a shield.

It is now the settled rule of Federal courts that where a defendant, who offers himself as a witness, fails to deny or explain incriminating circumstances when it is within his power to do so, such failure may not only be commented upon, but may be the basis of adverse inference and the jury may be instructed to that effect, all without infringement of the defendant's constitutional right not to be compelled to be a witness against himself.[21] In view of this narrowing construction of the privilege against self-incrimination, it would, we submit, be inconsistent to hold that the privilege is violated because the trial court failed to inform the jury that a defendant's voluntary choice to remain silent should not be considered by the jury, particularly where, as in the instant case, no mention of the matter had theretofore been made by either court or counsel.

In this connection, the attention of this Court is directed to the modern trend toward a more realistic view of the subject of the failure of a defendant in a criminal case to testify in his own behalf

[21] *Caminetti* v. *United States*, 242 U. S. 470, 492–495; *Raffel* v. *United States*, 271 U. S. 494, 497.

and the right of court and counsel to comment upon that fact. Thus the Constitution of Ohio [22] provides that the failure of a defendant to testify may be considered by the court and jury and may be made the subject of comment by the prosecution. Likewise, in California the Constitution was recently amended to permit comment by court or counsel upon accused's failure to testify." [23] In Iowa, a statute prohibiting such comment [24] was repealed [25] and the right of the prosecution to comment upon accused's silence has been upheld." [26] In New Jersey, which has no constitutional provision against self-incrimination nor any statute on the subject of the effect of defendant's silence, the courts have held that comment may be made upon the failure of the defendant to testify." [27]

As further evidence of the widespread view and growing demand that the refusal of a defendant in a criminal case to testify in his own behalf should not be a means of stultifying criminal prosecutions and permitting guilty persons to escape pun-

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[22] Art. I, Sec. 10, as amended Sept. 3, 1912.

[23] Cal. Const., Art. I, Sec. 13, as amended Nov. 6, 1934.

[24] Code 1927, Sec. 13,891.

[25] Act of March 28, 1929, 43 Gen. Acts, c. 269, p. 311.

[26] *State* v. *Stennett*, 220 Iowa 388. In South Dakota, however, a statute permitting the prosecutor to comment (Laws 1927, c. 93, p. 113) was held unconstitutional by the Supreme Court of that state in a three to two decision in *State* v. *Wolfe*, 64 S. D. 178.

[27] *Parker* v. *State*, 61 N. J. L. 308; *State* v. *Kisik*, 99 N. J. L. 385; Cf. *Twining* v. *New Jersey*, 211 U. S. 78, 90.

ishment, is the fact that the American Law Institute and the American Bar Association, after careful deliberation, both supported the proposition that court and counsel should be permitted to comment upon the accused's silence.[28]

While the instant case, of course, does not involve any question as to whether court or counsel should be permitted to comment upon the failure of the defendant to testify (since no such com-

[28] In 1931 the American Law Institute adopted the following resolution: "The judge, the prosecuting attorney and counsel for the defense may comment on the fact that the defendant did not testify" (9 Proc. Am. L. Inst. 202, 218).

During the discussion of this subject before the American Law Institute, the following statement was attributed to the Chief Justice (while Secretary of State, in 1924): "It is clear that reversals because a prosecuting attorney has directed the attention of the jury to a circumstance which no intelligent person could help taking into consideration of his own accord should have no place in any well ordered system of criminal procedure." (See 9 Proc. Am. L. Inst. 215; *State* v. *Wolfe*, 64 S. D. 178, 190–191, *supra*).

Likewise, in 1931, the American Bar Association approved the following resolution: "That by law it should be permitted to the prosecution to comment to the jury on the fact that a defendant did not take the stand as a witness; and to the jury to draw the reasonable inferences." 56 A. B. A. Rep. 137–152. See also 59 A. B. A. Rept. 131–141 (1934).

The Attorney General's Conference on Crime, held in Washington in December 1934, made the following specific recommendation: "Adopting a rule permitting court and counsel to comment to the jury on the failure of the defendant in a criminal case to testify in his own behalf." (See "Proceedings of the Attorney General's Conference on Crime," p. 454.)

ment was made), the foregoing is mentioned merely as fortifying the Government's argument that it is reasonable to say that a defendant remaining silent is not prejudiced, in the absence of prior comment on the subject, by the failure of a trial court to charge that the jury must avoid drawing any inference from the defendant's silence.

We submit, therefore, that the Circuit Court of Appeals correctly held that the refusal of the trial court to give the requested charge was not prejudicial error.

II

THE PROOF ESTABLISHED A SINGLE CONSPIRACY AS CHARGED IN THE INDICTMENT. BUT EVEN IF THE PROOF SHOWED SEVERAL SEPARATE CONSPIRACIES, THE VARIANCE WAS NOT FATAL

The petitioner contends that the Government proved several distinct and separate conspiracies, involving different groups of defendants, instead of proving the single conspiracy charged in the indictment, and that he was prejudiced by this alleged variance. We submit that the evidence established merely a single conspiracy as charged in the indictment but that if it did show more than one conspiracy the variance was not fatal.

While the trial court, in accordance with its ruling upon the defendant's motion for directed verdict (R. 273), instructed the jury that it was of the opinion that there was substantial evidence tending to sustain the Government's position that there was but a single conspiracy (R. 334), it specifically charged the jury that the prosecution must fail if the evidence showed that there were several independent or separate conspiracies and it also cautioned the jury "to make a very careful analysis of the evidence for the purpose of determining whether each and every one of the 15 defendants on trial are inseparable parties to that conspiracy" (R. 334). By these instructions the jury was obviously called upon to determine whether the proof established a single conspiracy with which each defendant was connected and was precluded from returning a verdict of guilty as against any defendant unless convinced that a single conspiracy was proved. Its verdict of guilty makes it clear that the jury reached the conclusion that the evidence in fact established but a single conspiracy of which the petitioner was a member. The Circuit Court of Appeals, after analyzing the evidence, also reached the conclusion that the proof showed a single conspiracy (R. 417–418). Since the probative sufficiency of the testimony has the support of the District Court (in which is included the verdict of the jury) and of the Circuit Court of Appeals, it is obvious that, as this Court said, in

Delaney v. *United States*, 263 U. S. 586, 590, "it would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength * * *". On the basis of the present record the petitioner's criticism must fall.

The evidence, which is summarized at length in the Appendix (*infra*, pp. 39–47), clearly warranted the jury in finding, as was said by the Circuit Court of Appeals (R. 417):

> that there had existed over a substantial period of time a conspiracy embracing a great number of persons, whose object was to smuggle narcotics into the Port of New York and distribute them to addicts both in this city and in Texas and Louisiana. This required the cooperation of four groups of persons; the smugglers who imported the drugs; the middlemen who paid the smugglers and distributed to retailers; and two groups of retailers—one in New York and one in Texas and Louisiana—who supplied the addicts.[*]

The petitioner contends, however, that since, as the Circuit Court of Appeals pointed out (R. 418), "The evidence did not disclose any cooperation or communication between the smugglers and either group of retailers, or between the two groups of retailers themselves," the Government failed to es-

[*] The various groups of conspirators will be referred to herein by the same names as were applied by the Circuit Court of Appeals, i. e., smugglers, middlemen, New York retailers, and Texas and Louisiana retailers.

tablish the single conspiracy charged in the indictment, i. e., a general conspiracy to import, transport, conceal and sell narcotic drugs. His position is that the smugglers' interest ceased upon the sale of the narcotics to the middlemen and that the latter's interest terminated when they sold the contraband to the two groups of retailers.

We submit, however, that the evidence discloses not a series of isolated sales of narcotics but a continuous course of dealings and repeated transactions between the various groups in large quantities of narcotics under such circumstances as would warrant the conclusion that the dealings were pursuant to a single plan or scheme to provide a complete system for the flow of narcotics from steamship to addict. The various groups, though possibly distinguishable because of the part which each played, were nevertheless essential to the success of the common enterprise. Thus, the smugglers effectuated the unlawful importation, the middlemen supplied the necessary contact between the smugglers and the two groups of retailers, and the latter were responsible for the ultimate disposition and sale to addicts. Moreover, as was said by the Circuit Court of Appeals (R. 418):

> the smugglers knew that the middlemen must sell to retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators at one end of the chain knew that the

unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole.

Since it is apparent that each group was essential to the accomplishment of the common purpose and was chargeable with knowledge that the traffic in which it was engaged could not be carried on without cooperation of others, it is wholly immaterial that the smuggling group may not have had direct connection with the two groups of retailers or that there was no immediate contact or communication between the two latter groups. It is settled that one who knowingly cooperates to further the object of an unlawful enterprise becomes a party thereto, and this regardless of whether all the conspirators are acquainted with each other or had direct contact with all the others.[20] A conspirator need not understand the entire scope of the conspiracy and his knowledge may be limited as to its extent and details, it being sufficient if one

[20] *Allen* v. *United States*, 4 F. (2d) 688, 691 (C. C. A. 7th), certiorari denied *sub nom. Mullen* v. *United States*, 267 U. S. 598; *Booth* v. *United States*, 57 F. (2d) 192, 197 (C. C. A. 10th); *Martin* v. *United States*, 100 F. (2d) 490, 496 (C. C. A. 10th), certiorari denied 306 U. S. 649.

becomes a member of a conspiracy knowing its purposes in a general way and acts with his fellow conspirators to a greater or lesser extent."[31]

The mere fact that conspirators individually or in groups perform different tasks directed towards a common end does not split up a conspiracy into several different conspiracies."[32] The courts have frequently held that a single conspiracy existed in cases where different groups of defendants, some of them unrelated to others, acted in effectuating a common unlawful purpose.

In *Jezewski* v. *United States*, 13 F. (2d) 599 (C. C. A. 6th), certiorari denied 273 U. S. 735, the proof revealed that the defendants in a liquor conspiracy case were divided into several groups—a "brewery" group composed of the persons who operated a brewery; a "distributing" group; an "official" group composed of city officials who were paid to furnish protection; and a "saloonkeeper" group which sold the beer to consumers. The court held that the evidence, which showed that the distributors purchased non-dealcoholized beer from the brewers, arranged for its distribution to the saloonkeepers, and promised the latter police pro-

[31] *McDonnell* v. *United States*, 19 F. (2d) 801, 803 (C. C. A. 1st), certiorari denied 275 U. S. 551; *Galatas* v. *United States*, 80 F. (2d) 15, 23 (C. C. A. 8th), certiorari denied 297 U. S. 711; *Craig* v. *United States*, 81 F. (2d) 816, 822 (C. C. A. 9th), certiorari denied 298 U. S. 690; *Marino* v. *United States*, 91 F. (2d) 691, 696 (C. C. A. 9th), certiorari denied *sub nom. Gullo* v. *United States*, 302 U. S. 764.

[32] *Lefco* v. *United States*, 74 F. (2d) 66, 69 (C. C. A. 3d).

tection, supported the conviction of members of all four groups as co-conspirators. It said (p. 602) that it was unimportant whether the saloonkeepers or police officers knew where the distributors were obtaining the beer, or whether the manufacturers knew to whom the distributors were selling, or whether the several groups were all or in part strangers to each other, because "They were each and all engaged in a common unlawful purpose, and each and all contributed their part to the furtherance of the unlawful purpose of the continuing conspiracy initiated by these distributors, if they were not in fact originally parties thereto".

In *Rudner* v. *United States*, 281 Fed. 516 (C. C. A. 6th), the evidence showed that a group of defendants in Canton, Ohio, purchased liquor from two separate groups of defendants in Pittsburgh, Pennsylvania. No connection was shown between the two groups of defendants in Pittsburgh. The court held, however, that the evidence established a single conspiracy and that it was not important whether one group of the Pittsburgh dealers knew that the Canton group was also dealing with the other Pittsburgh dealers."

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[11] See also *Allen* v. *United States*, *supra*, p. 692; *Wyatt* v. *United States*, 23 F. (2d) 791, 792 (C. C. A. 3d); certiorari denied 277 U. S. 588; *Booth* v. *United States*, *supra*, p. 197; *Lefco* v. *United States*, *supra*, pp. 68–69; *Short* v. *United States*, 91 F. (2d) 614, 618 (C. C. A. 4th); *United States* v. *Anderson*, 101 F. (2d) 325, 330 (C. C. A. 7th), certiorari denied May 1, 1939, No. 775, October Term, 1938).

~~*Yee Hem v. United States*, 268 U. S. 178, 184; U. S. C. Title 21, Sec. 174.~~

There can be no doubt that the New York retailers' group, of which the petitioner was admittedly a member, participated in the general conspiracy which the evidence established. The evidence discloses that this group had dealings with the middlemen relative to narcotic purchases (R. 71–72), and that even prior to the formation of the latter group a member thereof (defendant Ignaro) had been selling drugs to the petitioner and his partners, Mauro and Alfonso (R. 71, 117). In addition to purchasing narcotics from the middlemen, the New York retailers' group on one occasion sold 25 ounces of cocaine to the middlemen (R. 30–33, 52, 62, 92). One hundred seventy ounces of cocaine, as well as a quantity of opium, had been purchased by Mauro from the defendant Cellentano who had smuggled it into the United States from Canada. (R. 35, 36, 61). On one occasion, apparently prior to the formation of the New York retailers' group, Mauro and others, with the defendants Ruppolo and Liguorio acting as intermediaries, purchased $3,000 worth of narcotics from the defendant John Caputo of the smugglers' group. These drugs were delivered to Mauro and others by Ruppolo at the headquarters of the New York retailers' group (R. 67–70, 106–107).

Further, it is clear that the New York retailers' group was formed for the express purpose of deal-

ing in smuggled narcotics and that the group knowingly acquired such narcotics. Mauro testified that when the partnership was formed the defendant Alfonso (alias Alfonse Manzana), a member of the group, was to supply the drugs which were to be brought "to him from Europe" (R. 49).

United States v. *Katz*, 271 U. S. 354 and *United States* v. *Peoni*, 100 F. (2d) 401 (C. C. A. 2d), relied upon by the petitioner, are not in point. In the *Katz* case this Court, by way of *dictum*, observed (p. 355) that an indictment of the buyer and seller for a conspiracy to make a single sale of liquor would be of doubtful validity. In the *Peoni* case, which involved the sale of counterfeit money, it was held that one who sold the money to another person, who in turn resold some of it to a third person, could not be made a party to a conspiracy with the third person to possess the money. The court below, which decided the case, distinguished it from the instant case on the ground that the original vendor of the money did not know that his buyer was to sell the bills to the third person, and had no interest in whether he did. As indicated by the court below the situation differs here where each buyer group bought for resale and each successive resale from group to group meant only that the drugs were moving along a single channel of distribution to the addict. A fair inference arises from the repeated transactions and quantities involved that the various groups realized that they

were furthering the common purpose of the enterprise by the parts they played."[24]

However, even if it be assumed that there was a variance in the instant case in that the indictment charged one conspiracy and the proof established several, we submit that the variance was not fatal since the petitioner's substantial rights were not adversely affected thereby.

In *Berger* v. *United States*, 295 U. S. 78, which involved an admitted variance between the indictment and the proof, this Court held that under Section 269 of the Judicial Code,[25] "The true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused."[26]

The alleged complexity of the issues involved, the

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[24] See *Comeriato* v. *United States*, 58 F. (2d) 557, 558 (C. C. A. 4th); *United States* v. *De Vasto*, 52 F. (2d) 26, 30–31 (C. C. A. 2d); *United States* v. *Engelsberg*, 51 F. (2d) 479, 480–481 (C. C. A. 3rd); *Anstess* v. *United States*, 22 F. (2d) 594, 595 (C. C. A. 7th).

[25] Section 269 of the Judicial Code, as amended (U. S. C., Title 28, Sec. 391), so far as pertinent, provides:

* * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

[26] See also *Kopald-Quinn Co.* v. *United States*, 101 F. (2d) 628, 633 (C. C. A. 5th), certiorari denied May 15, 1939, No. 861, October Term, 1938; *Martin* v. *United States*, *supra*, pp. 494–495; *Marino* v. *United States*, *supra*, pp. 698–699; *Blumenthal* v. *United States*, 88 F. (2d) 522, 531–532 (C. C. A. 8th).

numerous witnesses heard, and the type of evidence admitted against defendants other than the petitioner [37] are the only respects in which the petitioner claims that he was prejudiced by the asserted variance. It is apparent, however, from the evidence that of the various activities alleged in the indictment to have been the objects of the conspiracy, i. e., smuggling, transporting, concealing and selling narcotics, the smugglers engaged in all of them and that the other three groups, including the New York retailers group, of which the petitioner was a member, engaged in all except smuggling. It is difficult to see how the petitioner and his group were in any wise prejudiced because as to other groups the evidence showed activities similar to those in which he and his group were admittedly engaged. So far as the evidence as to smuggling is concerned, this certainly could not have prejudiced the petitioner in the eyes of the jury since it is a matter of common knowledge that where, as in the instant case, narcotic traffic is engaged in upon a large scale, dependence must be had upon smuggling for the source of supply. Cf. *Yee Hem* v. *United States*, 268 U. S. 178, 184; U. S. C. Title 21, Sec. 174.

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[37] Petitioner states (Pet. 14–15) that evidence was admitted relating to other defendants which was of a highly prejudicial character because it showed that these defendants were engaged in various illegal activities such as prostitution, loan shark dealings, fraud, thievery, and gambling. However, it should be noted that this evidence was generally elicited by defense counsel on cross-examination of Government witnesses. See, e. g., R. 33, 97–98, 153, 216, 224.

III

THE INTERCEPTED INTRASTATE TELEPHONE COMMUNICATION WAS PROPERLY ADMITTED IN EVIDENCE, BUT EVEN IF ITS ADMISSION WAS ERROR, THE PETITIONER WAS NOT PREJUDICED

The petitioner contends that the trial court erred in admitting in evidence an intercepted intrastate telephone communication for the reason that the admission of such communication was prohibited by Section 605 of the Communications Act of 1934 (*supra*, p. 3). He asserts that under that section intercepted intrastate, as well as interstate, telephone communications are inadmissible.

In its brief in the case of *Weiss et al.* v. *United States*, No. 42, present Term, which is shortly to be argued, the Government has contended that Section 605 does not apply to intrastate communications. Since the petitioner urges no other ground for inadmissibility, it follows that if the Government's contention is sustained in the *Weiss* case, the communication was properly admitted.

However, even if the communication was inadmissible under Section 605, we submit that its admission did not constitute prejudicial error.

The telephone conversation in question (included in Government's Exhibit 25, R. 360) was intercepted when one LaRose, a co-defendant, made a call from the hotel room of Narcotic Agent Esch, who was posing as a buyer of narcotics (R. 18–19,

26–27). Other narcotic agents had installed a tap on the telephone wire leading into Esch's room and the telephone conversation in issue was heard and taken down by one of the agents (R. 142–146). Assuming that the petitioner was the "Jerry" with whom the ~~petitioner~~ LaRose had the telephone conversation, all that the conversation disclosed was that, aside from the greetings, LaRose and Jerry had a talk in Italian which was not understood by the agents and which was not translated in court (R. 27, 146, 360)."[35] It appears, however, from the record that prior to the introduction of the telephone conversation Esch had testified that he had been trying to buy cocaine from certain of the defendants and that LaRose had told him that the cocaine was in the possession of the petitioner. Esch also had testified that following this conversation LaRose made the telephone call in controversy from Esch's hotel room to a restaurant in New York

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[35] This conversation (R. 360) was as follows:

"In (Dick)—Drydock 4-6753.

"Out (Man)—Hello?

"In—Hello? La Salla restaurant?

"Out—Yes.

"In—Is Jerry there, on Broome St., this is Dickie.

"Out—No. Wait awhile, I'll send somebody to call him. (two minutes elapsed.)

"Out—(other man)—Hello?

"In—Hello, Jerry?

"Out—Yes.

"In—This is Dickie." (Remainder of conversation in Italian.)

City and asked for Jerry Bruno (R. 26–27). It is apparent, therefore, that the telephone conversation was merely corroborative of Esch's direct testimony. It consequently seems clear that the Circuit Court of Appeals was right in holding, particularly in view of the strong evidence of petitioner's guilt, that the intercepted telephone conversation, even if its admission was erroneous, was not of such a prejudicial character as to require reversal of the petitioner's conviction. See *United States* v. *Reed*, 96 F. (2d) 785 (C. C. A. 2d), certiorari denied, 305 U. S. 612; Section 269, Judicial Code (U. S. C. Title 28, sec. 391), *supra*, p. 34.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

ROBERT H. JACKSON,
Solicitor General.

O. JOHN ROGGE,
Assistant Attorney General.

WILLIAM W. BARRON,
Special Assistant to the Attorney General.

GEORGE F. KNEIP,
FRED E. STRINE,
W. MARVIN SMITH,
Attorneys.

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APPENDIX

SUMMARY OF THE GOVERNMENT'S EVIDENCE

As was said by the Circuit Court of Appeals (R. 417) the conspiracy participated in by the petitioner and the other defendants required the cooperation of four groups of persons: The smugglers, who imported the drugs; the middlemen, who paid the smugglers and distributed the narcotics to retailers; and two groups of retailers, one in New York and one in Texas and Louisiana, who sold the drugs to addicts. The petitioner was a member of the group of New York retailers composed of the defendants Al Mauro, Don Alfonso, Willie Ross and the petitioner (R. 48, 56, 62). For the convenience of this Court we will summarize some of the more important evidence dealing with the conspiracy and the part which each of the four groups played therein, taking the group of which the petitioner was a member last.

The principal members of the smugglers' group were Francois (Frenchie) and Gennaro Caputo, alias Capperio, John Vencileoni, Jose Lago and one Pete (whose name is Sanpedro) (R. 79, 87–88, 121, 123–125). These persons imported narcotics into New York from Europe. "Frenchie" Caputo would go to Marseilles, France, and arrange for the purchase of narcotics, place them on a steamer, and then take a different ship so that he would reach New York a week or more before the drugs arrived

(R. 79). He would then remain in New York until he and his partners sold the drugs, at which time he would go back to Europe with the money derived from the sale and return to New York in about six weeks with more drugs (R. 79).

The middlemen's group, as shown by the evidence, was closely connected with the smugglers' group. The principal members of the middlemen were the defendants Lucien Ignaro, "Jimmie the Blond" (Vincent Carreria), Louis Ruppolo, and Felix Papa, who formed a partnership in December, 1936, to deal in narcotics (R. 71, 73, 78, 103). Also associated with them was the defendant Sladyslaus Boysa (R. 114). Ignaro had been receiving shipments of drugs from Europe (R. 72–73) and in December, 1936, he expected a shipment of about 330 pounds of narcotics. "Jimmie the Blond" stated that he could sell these drugs. When they arrived, "Jimmie the Blond" was notified, and the partnership thereupon came into existence (R. 73). In January, 1937, Ignaro arranged for the removal of another shipment of about 300 pounds of narcotics from a ship (R. 74–75). A few days later, one Little Joe (defendant Joe Schipani, a local buyer of drugs), turned $6,800.00 over to Ruppolo, "Jimmie the Blond" and Felix Papa. Ruppolo then met Ignaro and Boysa at 55th Street and 8th Avenue, New York (the Central Bar and Grill), and they drove to Brooklyn, where they met the smugglers, Joe Lago and Francois Caputo. Ignaro paid the money to Lago and Caputo and the drugs were then transferred to the car which Ruppolo was driving (R. 75–76, 115–116). The same procedure was followed a few days later when $14,000.00 was given to Lago and

Caputo by Ignaro in payment for narcotics (R. 77–78).

The evidence showed that Ignaro and Louis Ruppolo conferred with the smugglers Caputo and Lago at the Central Bar and Grill, 55th Street and 8th Avenue (R. 79), and that Ruppolo and Ignaro had numerous conferences relative to the bringing of narcotics into the United States (R. 79). Ruppolo and Boysa would receive drugs from Lago (R. 80, 81), most of which were disposed of pursuant to arrangements made by "Jimmie the Blond" (R. 73, 76, 77, 82, 86–87). In April, 1937, Ruppolo received two kilograms of heroin from the defendant Vencileoni, and they, together with Ignaro, discussed the arrival of the next shipment which was expected on the S. S. *Normandie* about the end of that month (R. 87). The next shipment which was obtained from Vencileoni arrived on either the *Normandie* or the *Ile De France,* at which time Ruppolo and his associates "had an agreement to buy all the stuff that Vencileoni brought in" (R. 88). Prior to the arrival of the second shipment, Ruppolo, Vencileoni, Ignaro, "Jimmie the Blond", Felix Papa, and "a man from the boat" had a conference about it (R. 89). Ruppolo was on board the *Normandie* three or four times (R. 100), it being the ship which was used to bring the narcotics to this country (R. 104). Ignaro paid the defendant Charley Morgan $100.00 to take a package of narcotics off the *Normandie* in April, 1937, and at that time Ignaro had a talk with Vencileoni, who owned these drugs (R. 89, 117, 119). The drugs obtained from the *Normandie* were sold to Ignaro, Ruppolo, "Jimmie the Blond", and Papa (R. 119, 123–125).

Another group consisted of a ring of narcotic traffickers headed by the defendant Nicola Gentile, who purchased drugs from the middlemen for subsequent disposition to addicts in Louisiana and in Texas (R. 86, 89, 93). In February, 1937, Ruppolo and "Jimmie the Blond" went to Gentile's headquarters at 90 Elizabeth Street, New York City, to discuss the sale of opium on credit. Ruppolo told Gentile that Ignaro was the only person who would sell him narcotics on credit. A deal was then arranged whereby ten pounds of opium were sold to Gentile, payment to be made in eight days (R. 80). Ruppolo made a number of sales of opium to the defendant Louis King (R. 84), a member of the Gentile group, and also sold Gentile two kilograms of heroin which had been smuggled in on the *Normandie*. The price for these drugs was $1,960.00. Gentile had a check from Texas but it was too late in the day to cash it, so he took the money from his safe at 90 Elizabeth Street and gave it to Ruppolo. The following day Ruppolo paid Vencileoni $1,750.00 and received the two kilograms of heroin, which he (Ruppolo) delivered personally to the defendant Tony Lima (R. 86–87). According to Gentile, Lima was "his man in Texas" (R. 86), and Lima stated that the drugs were to be taken to Texas by bus, in a suitcase, by his daughters (R. 89). Ruppolo also went to New Orleans in September, 1937, and talked to Lima about purchasing narcotics (R. 93).

The drugs acquired by Gentile from the middlemen were disposed of in Texas and Louisiana by his associates (R. 148–151, 154–155). Various defendants transmitted money orders from New Or-

leans to Gentile and to the defendant Iacono[1] in New York (R. 156–159, 203–205, 209, 238–241, 362–364, 371, 373–375). Money orders were sent from defendants in New Orleans and Texas to other defendants in New York (R. 181–182, 203, 205–207, 361, 365, 371–372). Moreover, the defendant Gentile was in New Orleans in October, 1937 (R. 154), and was in Texas in August of that year (R. 236). A conference was held in the fishing camp of the defendant Joe Massa in Texas, in the summer of 1937, at which Gentile was present and was introduced to Massa as a big man in the narcotic business (R. 185). The defendant Joe Passarello also met Gentile in Houston, Texas, in a night club, and on other occasions in the home of the defendant Attardi. On the first occasion, Attardi told Passarello that Gentile was a "big boss" (R. 192–193). Joe Massa went to New York in April or May, 1936, and flew back to Texas with a quantity of morphine and heroin which he purchased from the defendant Casesa (R. 182).

The New York retailers' group, of which the petitioner was a member, likewise dealt with the middlemen. Early in 1936, Mauro, Alphonso, Ross and the petitioner decided to enter the narcotics business as partners, with headquarters in the rear of 380 Broome Street, New York City (R. 48, 56, 62). The drugs were kept in the cellar of 380 Broome Street (R. 49, 60) and the petitioner

[1] Iacono was convicted in the District Court (R. 345), but his conviction was reversed by the Circuit Court of Appeals because of insufficient evidence to establish his guilt (R. 421).

shared in the profits of this partnership (R. 49, 62). Ignaro had been selling drugs to Mauro, Bruno and Alphonso prior to the formation of the middlemen group (R. 71, 117), and when the middlemen formed their partnership in December, 1936, Ignaro and Ruppolo went to see Mauro at the latter's headquarters at 380 Broome Street (R. 72). Mauro asked Ignaro if "he had any more stuff", and Ignaro replied that it hadn't "come in from Europe yet, but that he expected it in a few weeks or months" (R. 72). An altercation ensued between Mauro and Ignaro, with the result that "Jimmie the Blond" was compelled to go to Mauro and straighten out the difficulties (R. 72–73).

At the time of the formation of the New York retailers' group, Alphonso said that he could get all the narcotics which were needed, and that they were to be brought to him "from Europe" (R. 49). In addition to the drugs which were smuggled from Europe, the partnership purchased 10 pounds of opium and 170 ounces of cocaine in December, 1936, from the defendant Mike Cellentano, who had smuggled the drugs from Canada (R. 35, 36, 61–62). Some of this cocaine was sold by Mauro to "Jimmie the Blond", who, together with Ruppolo, then sold it to Government witness Esch, a Narcotic Agent who investigated the case (R. 51–52, 62). Cellentano apparently had difficulties collecting for these narcotics from Mauro. Cellentano finally spoke to the petitioner at 380 Broome Street, told him that he (Cellentano) was having trouble getting his money, and asked the petitioner to intercede with Mauro. The petitioner stated that he would talk to Mauro and asked Cellentano

to send down the defendant La Rose (R. 36). Cellentano told the petitioner that the latter was to receive one-third of the narcotics, or one-third of the money received therefrom, for his assistance (R. 36–37). The petitioner then told Mauro to give Cellentano "some of the stuff and his money" and Mauro gave Cellentano "the stuff" (R. 52).

An instance indicating the nature of the dealings of Mauro and his associates with the smugglers occurred in December, 1935. The defendants Ignaro, Ruppolo and Ralph Liguorio had a conversation at the Central Bar and Grill, 55th Street and 8th Avenue, as the result of which Ruppolo and Liguorio drove to 380 Broome Street where they met Al Mauro (R. 67). Liguorio entered the building and "sat at a table with Al Mauro and a few people" (R. 106). He then reentered the car, showed Ruppolo $3,000.00 which had been given him by the people at 380 Broome Street, and stated that Al Mauro was the boss of that neighborhood with Don Alphonso (R. 67–68). Liguorio and Ruppolo then drove to Brooklyn and met Ignaro and John Caputo. Liguorio haggled over the price of drugs but Caputo refused to sell them cheaply. Liguorio and Ruppolo drove to another place where they met a pick-up car and received a package of narcotics. These drugs were delivered to Al Mauro and three or four other people at 380 Broome Street (R. 68–69, 106–107). The same procedure was then repeated immediately (R. 69–70).

The petitioner was also involved in May, 1937, with the defendant La Rose in an attempt either to sell Narcotic Agent Esch some narcotics or to swin-

dle him out of a sum of money (R. 26–27). At this time Esch had several conversations with Mauro, Ruppolo, and other defendants about the petitioner. Esch told Ruppolo that he had an opportunity to buy cocaine from the petitioner, and was informed in a subsequent conversation with Ruppolo that he would have to reach the petitioner through someone who was more reliable than La Rose (R. 30–31).

The Central Bar and Grill, 55th Street and 8th Avenue, New York City, was the headquarters of the middlemen (R. 70–71). It also was the common meeting place of the middlemen and the smugglers, and many other defendants not actual partners in any of the four groups also appeared at that place. The record shows that Vencileoni of the smugglers frequented the Central Bar and Grill and while there discussed with Ignaro and Ruppolo (of the middlemen) the arrival of drugs on the *Normandie* (R. 87, 89, 101); and Ignaro and Ruppolo also met and conferred there with "Frenchie" Caputo of the smugglers (R. 79). Other defendants who appeared at the Central Bar and Grill were Cellentano (R. 23), Ralph Liguorio (R. 67, 102, 106–107), Dominick Visco (R. 82–83), Louis Liguore (R. 100, 101, 117) and Charlie Morgan (R. 118). In addition, "Jimmie the Blond" of the middlemen operated from 141 Mulberry Street, where he and Ruppolo kept narcotics and made arrangements for their sale and distribution (R. 70–71, 72, 75, 78, 80–81). Mauro of the New York retailers on one occasion called Ignaro at the Central Bar and Grill (R. 72), and, on another occasion spoke to Ruppolo about cocaine in

ront of 141 Mulberry Street (R. 92). There was lso testimony that the petitioner had been down o "Jimmie the Blond's" place (presumably 141 Mulberry Street) bothering him for $500.00 which "Jimmie the Blond" and Ruppolo owed for a an of cocaine which they obtained from Mauro R. 113).

U. S. GOVERNMENT PRINTING OFFICE: 1953

pp. 1+2.

SUPREME COURT OF THE UNITED STATES.

No. 300.—October Term, 1939.

Jerry Bruno, Petitioner, vs. United States of America, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 4, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In affirming the conviction of Jerry Bruno, who, with eighty-seven others, was convicted of a conspiracy to violate the narcotic laws, the Circuit Court of Appeals for the Second Circuit dealt with an important question in the administration of federal criminal justice in such a way as to lead us to grant certiorari, 308 U. S. —.

Some of Bruno's co-defendants took the witness-stand. He did not. The trial court gave the following instructions to the jury regarding the attitude to be observed by them towards the accused as a witness:

"It is the privilege of a defendant to testify as a witness if, and only when, he so elects; and when he does testify his credibility is to be determined in the light of his interest, which usually is greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony."

Bruno requested this additional instruction:

"The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

The trial judge declined this request, saying "I feel that I've already covered that." The exception to this denial having been saved, the Circuit Court of Appeals found no error in the refusal, although confessing that the guidance which had been given the jury "was not the equivalent of what the defendant had requested",

Bruno v. *United States*, 105 F. (2d) 491. By this, we take it, the court below meant that the topic on which Bruno proffered an instruction had not been charged at all.

Therefore, the narrow question before us is whether in these circumstances Bruno had the indefeasible right to have the jury told in substance what he asked the judge to tell it. The issue is determined by a proper application of the Act of March 16, 1878, 20 Stat. 30, now 28 U. S. C. § 632.[1]

That Act freed the accused in a federal prosecution from his common law disability as a witness. But Congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not tell against him. The accused could "at his own request but not otherwise be a competent witness. And his failure to make such a request shall not create any presumption against him." Such was the command of the law-makers. The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts. *Sparf* v. *United States*, 156 U. S. 51. By legislating against the creation of any "presumption" from a failure to testify, Congress could not have meant to legislate against the psychological operation of the jury's mind. It laid down canons of judicial administration for the trial judge to the extent that his instructions to the jury, certainly when appropriately invoked, might affect the behavior of jurors. Concededly the charge requested by Bruno was correct. The Act of March 16, 1878, gave him the right to invoke it.

A subsidiary question remains for determination. It derives from the Act of February 26, 1919, 40 Stat. 1181, 28 U. S. C. § 391,[2] whereby appellate courts are under duty in

[1] Section 632: "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

[2] Section 391: "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

criminal as well as in civil cases to disregard "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Is the disregard of the right which Congress gave to Bruno an error, the commission of which we may disregard? We hold not. It would be idle to predetermine the scope of such a remedial provision as § 391 by anticipating the myriad varieties of rulings made in trials and attempting an abstract, inclusive definition of "technical errors". Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him.

To the suggestion that it benefits a defendant who fails to take the stand not to have the attention of the jury directed to that fact, it suffices to say that, however difficult it may be to exercise enlightened self-interest, the accused should be allowed to make his own choice when an Act of Congress authorizes him to choose. And when it is urged that it is a psychological impossibility not to have a presumption arise in the minds of jurors against an accused who fails to testify, the short answer is that Congress legislated on a contrary assumption and not without support in experience. It was for Congress to decide whether what it deemed legally significant was psychologically futile. Certainly, despite the vast accumulation of psychological data, we have not yet attained that certitude about the human mind which would justify us in disregarding the will of Congress by a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause "shall not create any presumption against him."

We conclude that the substance of the denied request should have been granted, and the judgment therefore is

Reversed.

Mr. Justice McReynolds concurs in the result.